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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 322

FRANCES VIVIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 29–37) is not yet reported. A previous opinion denying the government's motion to dismiss the appeal (Pet. 23–27) is reported at 217 F. 2d 882.

JURISDICTION

The judgment of the Court of Appeals was entered June 28, 1955 (Pet. 28). The petition for a writ of certiorari was filed August 13, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 235 (a) of the Immigration and Nationality Act of 1952 authorizes an immigration officer to subpoena a witness to testify in connection with an administrative investigation into the right or privilege of certain identified resident aliens to remain in the United States.

2. Whether an application to the district court for an order enforcing compliance with the subpoena issued pursuant to Section 235 (a) must be by formal civil action instituted by a summons under the Federal Rules of Civil Procedure.

3. Whether the subpoena sufficiently apprised petitioner of the subject-matter of the investigation which the Immigration and Naturalization Service was then conducting and of the statutory authority under which it was being conducted.

STATUTE INVOLVED

Section 235 (a) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, provides in pertinent part:

> * * * The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the

United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals (Pet. 28) affirming an order entered on September 17, 1954, by the United States District Court for the Northern District of Illinois (R. 12), compelling her to appear before a designated investigator of the Immigration and Naturalization Service and to give testimony in a pending administrative investigation of the right of Henry and Gertrude Noyes to remain in the United States which was being conducted pursuant to Section 235 (a) of the Immigration

and Nationality Act of 1952. The facts pertinent to the issues raised may be summarized as follows:

On April 2, 1954, a subpoena was issued and signed by the Acting District Director of the Immigration and Naturalization Service commanding that petitioner appear on April 7, 1954, at a specified place in Chicago, Illinois, and give testimony in an administrative investigation identified on the subpoena as "In re Henry Halsey Noyes and Gertrude Stedman Noyes." Petitioner was served in person with the subpoena the same day (R. 4–5). After being granted a continuance to April 13, 1954, petitioner appeared at the place designated but refused to testify (R. 6, 7).

On June 2, 1954, the United States Attorney presented to the district court *ex parte* a "Complaint to Compel Obedience to Subpoena" alleging the refusal of the petitioner to testify and praying that the court issue an order pursuant to Section 235 (a) of the Immigration and Nationality Act requiring her to appear in obedience to the subpoena (R. 3–4). The district judge issued an order requiring that petitioner appear before him at ten o'clock on June 11, 1954, to give testimony pursuant to the subpoena (R. 5–7). A certified copy of this writ was served on petitioner by a United States Marshal on June 4, 1954 (R. 8). On June 11, 1954, petitioner filed a motion to dismiss the "complaint" and to vacate the order of June 2, 1954, arguing in essence that the Federal Rules of Civil Procedure require

that compliance with such a subpoena be secured through a formal civil action rather than through motion to the court on an *ex parte* application (R. 8–9). In an amended motion filed on July 30, 1954, petitioner raised the additional contention that the subpoena power granted to service officers by Section 235 (a) of the Immigration and Nationality Act of 1952, *supra*, is inapplicable to administrative investigations of deportability (R. 10–11). After oral hearing the court denied the motion on September 17, 1954, and directed petitioner to appear on October 1, 1954, before a specified investigator of the Immigration and Naturalization Service to give testimony in the pending investigation (R. 12).

Petitioner appealed from that order (R. 14–16). The government's motion to dismiss the appeal on the ground that the order was not final was denied on January 3, 1955. *United States* v. *Vivian*, 217 F. 2d 882 (C. A. 7) (Pet. 22–27). The Court of Appeals proceeded to hear the appeal on its merits, and unanimously affirmed the opinion of the district court (Pet. 28–37).

ARGUMENT

1. Petitioner contends that the power conferred on the Attorney General and officers of the Immigration and Naturalization Service by Section 235 (a) of the Immigration and Nationality Act of 1952 (*supra*, pp. 2–3) "to require by subpena the attendance and testimony of witnesses before im-

migration officers * * * relating to the privilege of any person to * * * reside in * * * the United States or concerning any matter which is material and relevant to the enforcement of this Act and the Administration of the Service * * * ", does not grant authority to subpoena witnesses in connection with an investigation into the possible deportability of resident aliens.

This is not, as petitioner contends (Pet. 7), a novel question. Section 16 of the Immigration Act of 1917 (c. 29, 39 Stat. 885, 8 U. S. C. 1946 ed., 152) provided for the issuance of subpoenas by district directors and inspectors in charge for matters "touching the right of any alien to enter, reenter, *reside in,* or pass through the United States." [Emphasis supplied.]

Under that section the subpoena power was deemed to extend to investigations of possible deportability, as against the contention that it should be confined solely to entry or exclusion matters, since deportation relates to the right to reside in this country. *Azzollini* v. *Watkins,* 172 F. 2d 897, 899 (C. A. 2); *Graham* v. *United States,* 99 F. 2d 746, 748–749 (C. A. 9); *Loufakis* v. *United States,* 81 F. 2d 966, 967 (C. A. 3). Under Section 235 (a) of the 1952 Act the subpoena power still applies to matters touching the right of persons to "reside in * * * the United States", and is more broadly granted to the Attorney General and designated officers of the Service for use "concerning any matter which is material and relevant

to the enforcement of this Act and the administration of the Service". Clearly the broader language of Section 235 (a) in the 1952 Act should not be given a more narrow interpretation than the precursor provision in the 1917 Immigration Act.

The questions presented before this Court in *United States* v. *Minker*, No. 35, this Term, and *Falcone* v. *Barnes*, No. 47, this Term, as to whether the subpoena power extends to investigations relating to naturalized *citizens* and whether the person under investigation may be summoned, are not here involved. The investigation here relates to the right of *aliens* to continue to reside in the United States, and petitioner is being called as a witness and is not herself under investigation.

While tacitly conceding that the express statutory language would seem to grant the subpoena power sought to be exercised against her, petitioner attempts to circumscribe the express meaning and application of the subpoena provision by virtue of its placement in the 1952 Act under a chapter headed "Entry and Exclusion" (Pet. 8–10). As is argued in more detail in the brief for the government in the *Minker* case (No. 35, this Term, pp. 15–29), whatever value captions and headings may have in resolving patent ambiguities they "cannot limit the plain meaning of the text", *Brotherhood of Railroad Trainmen* v. *B. & O. R. R. Co.*, 331 U. S. 519, 528–529, especially in instances where, as here, the legislative history and

administrative background support the construction required by the terms of the statute.

The investigation involved herein is within the literal meaning and manifest intent of Section 235 (a).

2. Petitioner also contends (Pet. 11–14) that aid in securing compliance with the subpoena may be sought from a court only by a plenary action with all of the incidents of a full scale trial provided for in the Federal Rules of Civil Procedure. In particular, she cites the absence of service of summons on her (in addition to the subpoena) as constituting a fatal jurisdictional defect in the proceedings culminating in the order under review.

The procedure actually followed—application to the court for an *ex parte* order, personal service of the order, followed by a hearing with full opportunity to petitioner to raise objections—is in accord with the usual practice for judicial enforcement of administrative subpoenas.[1] Peti-

[1] Frequently in this type of proceeding when judicial enforcement of an administrative subpoena is sought, the court will issue a "show cause" order, followed by the rendition of a final order after hearing. Cf. *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 190, fns. 2 and 3; *Durkin* v. *Fisher*, 204 F. 2d 930, 932 (C. A. 7); *United States* v. *Cream Products Distributing Co.*, 156 F. 2d 732 (C. A. 7); *Genecov* v. *Fed. Petroleum Board*, 146 F. 2d 596 (C. A. 5), certiorari denied, 324 U. S. 865. The procedure herein (*i. e.*, service of the June 2, 1954 *ex parte* order, followed by a hearing with full opportunity for contest, followed by a superseding order) is equivalent thereto. Cf. *Shotkin* v. *Nelson*, 146 F. 2d 402, 405 (C. A. 10).

tioner argues that such procedure is not authorized by Section 235 (a) because that section prescribes no special form of proceeding. That section, however, vests the Attorney General and officers of the Service with authority to "invoke the aid of any court of the United States" to secure enforcement of subpoenas, and also authorizes "any United States district court within the jurisdiction of which investigations or inquiries are being conducted" to issue an order in case of contumacy requiring the recalcitrant witness to appear and testify. This is the equivalent of the usual statutory language authorizing summary applications for court aid in support of administrative investigations (*cf., e. g., Penfield Co.* v. *Securities and Exchange Commission,* 330 U. S. 585, 587; *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 200, fn. 24; *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 503. *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357, 360),[2] which has always been construed to authorize an expeditious application for court aid without resort to all the procedures normally incident to a common law trial. *United States* v. *Cream Products Distributing Co.,* 156 F. 2d 732 (C. A. 7); *Bowles* v. *Bay of New York Coal and Supply Corp.,* 152 F. 2d 330, 331 (C. A. 2); *Shotkin* v.

[2] An incomplete list of cognate statutory provisions is set forth at p. 41, fn. 28, Brief for the United States, *United States* v. *Minker,* No. 35, this Term.

Nelson, 146 F. 2d 402 (C. A. 10); *Goodyear Tire and Rubber Co.* v. *National Labor Relations Board,* 122 F. 2d 450 (C. A. 6); *Cudahy Packing Co.* v. *National Labor Relations Board,* 117 F. 2d 692, 694 (C. A. 10). As the court below held, the language of Section 235 (a) cited above brings this proceeding within the exception to Rule 81 (a) (3) of the Federal Rules of Civil Procedure providing that the rules "apply to proceedings to compel the giving of testimony * * * in accordance with a subpoena issued by an officer or agency of the United States * * * *except as otherwise provided by statute.*" [Italics added.] Where the authority to apply for judicial enforcement of an administrative subpoena is granted by special statute such proceedings are not controlled (except as to appeals) by the Federal Rules of Civil Procedure. *Bowles* v. *Bay of New York Coal and Supply Corp.,* 152 F. 2d 330, 331 (C. A. 2); *Genecov* v. *Fed. Petroleum Board,* 146 F. 2d 596, 598 (C. A. 5), certiorari denied, 324 U. S. 865; *Perkins* v. *Endicott Johnson Corp.,* 128 F. 2d 208, 226–227 (C. A. 2), affirmed, 317 U. S. 501.

Petitioner's other objections to the proceedings are equally without merit. While no summons was served on her, she had been served with a subpoena which she was apprised would be enforced by court order, and she was duly served with the initial order of the court. She had full opportunity to appear and did in fact appear to contest the validity of the subpoena. The court

therefore had jurisdiction over her and over the subject-matter of the suit. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 488; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 728–729; *Goodyear Tire and Rubber Co.* v. *N. L. R. B.*, 122 F. 2d 450 (C. A. 6); *Cudahy Packing Co.* v. *N. L. R. B.*, 117 F. 2d 692 (C. A. 10).

Petitioner also contends (apparently to buttress her assertion that a plenary action was required to be instituted to enforce compliance) that the court below erroneously rejected her theory that the instant action is "a *de novo* civil action" (Pet. 12–14). This is primarily a problem in semantics. The summary type of proceeding authorized here is independent in the sense that it is "a case or controversy" between the Service and the witness in regard to her legal obligation to testify which will, after hearing, terminate in a court order. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 488; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 38. Its institution and the subsequent assumption of jurisdiction by the court does not, however, preempt the authority of the administrative agency or open up for judicial decision the issues which are more properly reserved for the judgment of such agency in the first instance. *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 214. It is a special type of proceeding presenting only the issue of the legitimacy of the subpoena, which may result only in the promulgation of

an order in aid of an administrative investigation, itself nonjudicial in nature. But the fact that it is a separate proceeding does not, independent of the governing statute, demand that all of the procedures normally incident to a plenary action at law be followed.

3. Finally, petitioner contends that the subpoena was not sufficiently specific and did not apprise her of the exact nature of the testimony that she would be called upon to give in the administrative proceeding. Since this was a personal subpoena to give testimony as a witness in a matter in which petitioner was not directly concerned, it is difficult to understand the basis of the objection. The subpoena did inform petitioner that her testimony was required in an investigation pursuant to Section 235 (a) of the Immigration and Nationality Act identified as "In re Henry Halsey Noyes and Gertrude Stedman Noyes", and it can hardly be contended that she was insufficiently apprised of at least the subject-matter of the investigation.[4]

[4] The power of an administrative agency to investigate and therefore the power to subpoena witnesses is not narrowly limited to issues already drawn in adversary litigation (*United Sttaes* v. *Morton Salt Co.*, 338 U. S. 632, 642–643), nor is it a prerequisite to forecast, prior to undertaking the investigation, even that the person under investigation is within the coverage of the applicable statute, *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 508–509, or that he or she has violated a law. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 216. An investigative subpoena is usually sustained unless the evidence it calls for is plainly irrelevant to any lawful purpose of the administrator in the discharge

Moreover, petitioner was informed by the government's application prior to the issuance of the final order appealed from (R. 3–4), "that the Immigration and Naturalization Service is conducting an investigation relating to the right or privilege of Henry Halsey Noyes and Gertrude Stedman Noyes to remain in the United States." It is difficult to perceive how the subject-matter of the investigation could be more fully described without announcing the results of the investigation in advance. Petitioner was informed of the names of the persons to be investigated, the precise subject of the investigation, and the statutory authority under which the investigation was being conducted.[4] This was sufficient to enable her to make any pertinent defense both in the enforcement proceeding, and before the Service investigator.

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of his duties. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 509; *Kilgore Nat. Bank* v. *Fed. Petroleum Board*, 209 F. 2d 557, 560 (C. A. 5).

[4] Investigations of the possible deportability of persons are also controlled by the following regulation (8 C. F. R. 242.11):

"*Investigations*—(a) *Persons believed to be subject to deportation.* The case of every person believed to be subject to arrest and deportation shall be investigated by such officer as may be designated for that purpose.

"(b) *Purpose of investigation.* The purpose of the investigation shall be to discover whether or not a prima facie case for deportation exists; that is, whether there is credible evidence reasonably establishing that the person investigated is an alien and that he is subject to deportation."

CONCLUSION

The decision below is correct, and there is no conflict of decisions in the Courts of Appeals. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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